Financial Services Update

May 28, 2015

HIGHLIGHTS

Federal Regulatory Developments

HUD Announces Changes to FHA Documents, Certifications and Disclosures

Fannie Mae and Freddie Mac Announce New Seller/Servicer Financial Requirements

CFPB Seeks to Help Veterans Leaving Service and Vulnerable Consumers with New Financial Coaching Initiative

Litigation Developments

Supreme Court Rejects Wartime Tolling for Civil False Claims Act Cases

Florida Court Requires Additional Proof of Potential Settlement Payments to Class Members

WBK News

Weiner Brodsky Kider PC recently held exclusive TRID Workshops for clients which provided an overview and understanding of the key elements of TRID, and how the rule will affect the policies, procedures and training implemented by mortgage lenders. The firm now has made available the **WBK TRID Workbook**, which covers integrated disclosure readiness as the workshops did, from pre-application to post-closing under TRID. Purchase a copy for $250.

SUMMARIES

Federal Regulatory Developments

HUD Announces Changes to FHA Documents, Certifications and Disclosures

In FHA INFO # 15-38 and FHA INFO # 15-39, which HUD published on May 21 and May 22, 2015, respectively, HUD notified FHA-approved mortgagees, servicers and other stakeholders that HUD has: 1) updated the instructions for the Title II Forward Model Note and Model Mortgage documents; 2) released new model language for the Settlement Certification (formerly known as the Addendum to HUD-1 Settlement Statement); and 3) published in the Federal Register a notice to solicit comments on proposed revisions to Form HUD 92900-A, *HUD/VA Addendum to Uniform Residential Loan Application*.

Updated Instructions for Title II Forward Model Note and Model Mortgage

As noted in FHA INFO # 15-38, HUD released revised instructions for mortgagees to use when preparing a Title II Forward Note and Mortgage. In addition, HUD waived the inconsistent requirement in Section II.A.7.b.iv of the new HUD Handbook 4000.1 to verify the accuracy of paragraphs 9 and 18 in the FHA Mortgage, so long as the FHA Mortgage is in compliance with state laws. Specifically, HUD stated in FHA INFO # 15-38: "FHA is waiving the requirement in Section II.A.7.b.iv to verify the inclusion of specific numbered paragraphs provided the model mortgage is obtained in compliance with FHA's instructions."

A copy of the new instructions for the Title II Forward Model Note is available here: http://portal.hud.gov/hudportal/documents/huddoc?id=modelfwd_notes5-2015.pdf

A copy of the new instructions for the Title II Forward Model Mortgage is available here: http://portal.hud.gov/hudportal/documents/huddoc?id=modelfwd_mtg5-2015.pdf

Model Language for the Settlement Certification

In FHA INFO # 15-38 and FHA INFO # 15-39, HUD stated that it has updated the model language for the Settlement Certification (formerly known as the Addendum to HUD-1 Settlement Statement). Mortgagees must begin using the new model language for all FHA-insured Title II forward mortgage applications received on or after August 1, 2015. This date coincides with when the new disclosure requirements under the CFPB's TILA RESPA Integrated Disclosure Rule (or "TRID"), which will replace the HUD-1 form, go into effect.

Note that the new model language in the Settlement Certification is to be used with FHA-insured Title II *forward* mortgages, not FHA-insured reverse mortgages (HECMs). Specifically, HUD stated in FHA INFO # 15-38 that HECM lenders should continue

using the Addendum to the HUD-1 published in Mortgagee Letter 2010-39 for all HECM loans.

A copy of the new model language for the Settlement Certification is available here: http://portal.hud.gov/hudportal/documents/huddoc?id=settlement_certification.pdf

Notice to Solicit Comments on Proposed Revisions to Form HUD 92900-A

On May 15, 2015, HUD published in the Federal Register a notice to solicit comments on proposed revisions to Form HUD 92900-A, *HUD/VA Addendum to Uniform Residential Loan Application*. Public comments are due by July 14, 2015. HUD stated in FHA INFO # 15-38 that the proposed revisions to Form HUD 92900-A include, but are not limited to, changes to achieve the following:

- Differentiate between initial and final Uniform Residential Loan Application;
- Revise mortgagee certification on debarment and suspension to be loan specific;
- Remove references to Handbooks no longer in use by Single Family Housing;
- Update language regarding acceptable sources of funds;
- Provide current non-discrimination language; and
- Update terminology to reflect new Handbook 4000.1.

Note that all comments on the proposed revisions must be submitted using the instructions found in the Federal Register notice.

A copy of the Federal Register notice regarding the proposed revisions to Form HUD 92900-A is available here:
http://www.gpo.gov/fdsys/pkg/FR-2015-05-15/pdf/2015-11807.pdf

Fannie Mae and Freddie Mac Announce New Seller/Servicer Financial Requirements

Fannie Mae and Freddie Mac on May 20, 2015 announced new net worth and liquidity requirements for all their non-bank and depository institution seller/servicers. The GSEs also came out with new servicing operational requirements. The new rules were first proposed in January 2015 and now they are official.

For both Fannie Mae and Freddie Mac the financial eligibility requirements go into effect for all seller/servicers on December 31, 2015, while the effective date for the operational requirements, which cover servicing, is August 18, 2015 for Freddie Mac and September 1, 2015 for Fannie Mae.

All approved seller/servicers of Fannie Mae and Freddie Mac must achieve and maintain by the effective date a minimum net worth requirement of $2.5 million, plus a dollar amount representing 25 basis points, or 0.25%, of the unpaid principal balance of all the one-to-four unit residential mortgage loans a seller/servicer services, regardless of whether they are owned by the servicer or a third-party investor.

Additionally, the minimum capital ratio for non-bank seller/servicers for both GSEs will be a tangible net worth/total assets ratio greater than or equal to 6%. Depository institution seller/servicers must meet the minimum regulatory capital requirements of their primary regulator.

The new minimum liquidity requirements for non-bank seller-servicers will be liquidity equal to or greater than 3.5 basis points of the total unpaid principal balance of all agency servicing, including Fannie Mae, Freddie Mac and Ginnie Mae, plus 200 basis points of the sum of the nonperforming unpaid principal balance (90 days or more delinquent) in excess of 6% of the total agency unpaid principal balance.

All Fannie Mae and Freddie Mac seller/servicers must maintain these minimum requirements at all times. Seller/servicers engaged in servicing transfers also must meet the minimum requirements. The requirements apply to loans in which the servicer is the master servicer, and loans that are subserviced are not applied to either the capital or liquidity requirement.

The GSEs also are expanding their operational eligibility requirements for servicing transfers and subservicing. These will touch upon master servicers and servicing agents, subsequent transfers of servicing, seller/servicer notification requirements and quality control programs.

Fannie Mae and Freddie Mac have added requirements on the roles and responsibilities of master services and their servicing agents, as well as posting new Servicing Transfer Best Practices. The requirements remind seller/servicers to notify Fannie Mae or Freddie Mac if they become the subject of certain legal proceedings or regulatory actions.

In addition, servicers and master servicers must conduct quality control audits and reviews of subservicer and outsource vendor contractual servicing activities.

Fannie Mae Servicing Guide Announcement SVC-2015-08 is available here: https://www.fanniemae.com/content/announcement/svc1508.pdf.

Freddie Mac Bulletin 2015-8 with all the eligibility requirements is available here: http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1508.pdf.

CFPB Seeks to Help Veterans Leaving Service and Vulnerable Consumers with New Financial Coaching Initiative

The CFPB on May 20, 2015 introduced a new Financial Coaching Initiative designed to assist the nearly 250,000 servicemembers who leave active duty each year and also economically underserved populations in attaining their financial goals. The initiative is the first program paid for by the CFPB's Civil Penalty Fund.

The coaching initiative has lined up 60 diverse partner organizations from around the country to host the financial coaches. The host sites offering individual financial coaching support are available to former servicemembers and those in need living in urban, suburban and rural areas.

CFPB Director Richard Cordray said, "The coaches hired for the program have experience working with the populations they will serve, are trained in financial coaching techniques, and will be accredited by the Association for Financial Counseling and Planning Education."

The organizations offering coaching were selected, after a nationwide search, by the CFPB, in partnership with the Department of Labor (DOL). The sites include nonprofits and DOL American Job Centers, which offer people resources to help them find jobs, identify training programs and gain needed job skills. In fact, all the nonprofit coaching hosts offer job training and education services that economically vulnerable consumers also can take advantage of when seeking financial counseling.

Cordray noted that the coaching initiative holds real promise for the quarter of a million servicemembers transitioning to civilian life each year. "Many servicemembers went directly from school into the military, so the move to civilian life and a less structured environment poses new and different financial issues," he said.

Financial coaching can supplement financial skills servicemembers learn through the Department of Defense's Transition Assistance Program (TAP). Servicemembers may also use an individual coach to help them rework financial plans they made while going through TAP, according to the CFPB.

The coaching initiative also will target the more than 49 million people who live below the poverty line and the more than 68 million who are financially underserved. Many of these consumers have limited access to mainstream financial services and often have to rely on more expensive alternative financial services. The bureau noted that individual financial coaching can help them make good financial decisions and, in many cases, find less costly financial services.

The CFPB press release announcing the Financial Coaching Initiative can be found here: http://www.consumerfinance.gov/newsroom/cfpb-launches-financial-coaching-initiative/.

Litigation Developments

Supreme Court Rejects Wartime Tolling for Civil False Claims Act Cases

The U.S. Supreme Court recently ruled on a hotly anticipated case regarding the False Claims Act. In *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, the Supreme Court unanimously rejected the government's position that an obscure law known as the Wartime Suspension of Limitations Act (WSLA) indefinitely tolls the statute of limitations for alleged civil violations of the False Claims Act.

The WSLA suspends the statute of limitations for "any offense" against the federal government involving fraud. The WSLA applies during any time of formally declared war. Since 2008, WSLA has also applied during any time in which there is a congressionally approved "Authorization for the Use of Military Force," such as those in place authorizing the conflicts in Iraq and Afghanistan. This tolling does not end until five years after Congress or the President formally announces an end to hostilities.

The government argued that the WSLA applied to suspend the statute of limitations in the False Claims Act for both criminal and civil actions. The company argued that the WSLA only applied to criminal actions under the False Claims Act. The Supreme Court unanimously rejected the government's position, relying on the statutory text and legislative history to rule that the WSLA applies only to criminal allegations of fraud, and does not suspend the statute of limitations for alleged civil violations of the False Claims Act.

This ruling confirms that the statutory limitations provisions within the False Claims Act (which, with a few exceptions, is six years) applies to civil actions under the False Claims Act.

The Supreme Court also clarified the "first to file" bar under the False Claims Act. Generally, any civil *qui tam* action brought by a private litigant on behalf of the government is barred if another previously filed lawsuit, based on the same facts, is pending.

The Supreme Court found that this prohibition only applies when another case based on the same facts is live and pending in a court. The bar does not operate to bar all subsequently filed False Claims Act matters on the same subject matter.

WBK regularly defends financial services companies throughout the country against alleged civil violations of the False Claims Act.

Florida Court Requires Additional Proof of Potential Settlement Payments to Class Members

The District Court for the Southern District of Florida recently required the submission of additional information to substantiate the fairness of a settlement agreement preliminarily approved by the court. The case involves the settlement of claims about lender-placed insurance practices against Ocwen Loan Servicing and Assurant.

On January 23, 2015, the court preliminarily approved a settlement agreement involving a partial refund of lender-placed insurance premiums paid by or charged to mortgage borrowers in *Lee v. Ocwen Loan Servicing, LLC, et al*. Borrowers who submit a claim would receive a refund of 12.5 percent of the premium. The agreement also provided injunctive relief requiring Ocwen and Assurant to change the administration of its lender-placed insurance program. The final fairness hearing is set for June 11, 2015.

On May 13, 2015, partially in response to three objections from putative class members, the court ordered plaintiffs and Ocwen to address the objections and to provide supplemental information about the benefits that borrowers would receive, specifically: (a) the amount of attorneys' fees and defendants' agreement not to challenge the fee petition; (b) whether the fairness of the attorneys' fee petition should be analyzed in the context of claims actually paid, or the potential for claims that could be paid, or a "lodestar" procedure; and (c) the timing of the final fairness hearing and whether the court should delay ruling on the final settlement approval until the claims period has expired so that it will have more complete information on actual claim amounts, as well as guidance from an anticipated court of appeals ruling on a similar issue.

The court's newly found emphasis on the dollar amount defendants will actually pay is a bit odd. There is no doubt in this lawsuit that an Ocwen affiliate received 12.5 percent of the lender-placed insurance premium as a "commission."

Because the amount of the payment to each borrower submitting a claim will be 12.5 percent of the premium they paid or were charged, it is difficult to imagine a fairer settlement than this one, which appears to make all claimants whole.

If a payment equal to 12.5 percent of the lender-placed insurance premium makes each borrower whole, little more can be done to make the settlement fairer, unless the court is indirectly questioning whether a claims-made process is "fair," or the amount of attorneys' fees may be excessive. Indeed, the court seems to be taking issue with whether the defendant will actually pay 12.5 percent of all lender-placed insurance premiums.

Whether it is appropriate to have settlements with a claims-made process, or conversely, inappropriate to pay all putative class members without some showing of interest in the lawsuit, and the corresponding attorneys' fees for plaintiffs' attorneys, are often ignored or overlooked in class action settlements. But if these are the issues of concern to the court, it should not be obscuring the analysis by appearing to focus on

the amount of the payment to the putative class members. Rather, the court should be asking for information and analysis of the actual issues of interest.

Weiner Brodsky Kider PC represents mortgage lenders and servicers throughout the United States in nationwide and statewide class actions.